

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

Case No.: _____

TIFFANY AGUERO, individually, and on
behalf of her minor child, L.H., and on
behalf of all others similarly situated,

Plaintiff,

v.

“CLASS REPRESENTATION”

NOVA SOUTHEASTERN UNIVERSITY,
INC.,

Defendant.

_____ /

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, TIFFANY AGUERO, individually, and on behalf of her minor child, hereinafter referred to as L.H. (to protect her identity), and on behalf of all others similarly situated, by and through undersigned counsel, brings this action in her individual capacity and on behalf of a similarly situated “Class” or “Class Members” of individuals as defined below against Defendant, NOVA SOUTHEASTERN UNIVERSITY, INC. (“NSU”), and for their Complaint allege, pursuant to their knowledge, or where there is no personal knowledge, upon the investigation of counsel and/or upon information and belief, fundamentally that NSU, by and through its dentists, hygienists, orthodontists, College of Dental Medicine students and residents, and Post-Graduate Orthodontic Clinic staff/employees, between July 2015 and February 2018, negligently exposed Plaintiff’s minor child and the “Class” or “Class Members” to HIV, Hepatitis C, Hepatitis B and other illnesses by failing to use the requisite degree of care, skill, diligence and/or attention in sterilizing dental and/or orthodontic equipment, and/or

NSU failed to appropriately supervise and ensure compliance with sterilization protocols by NSU dentists, hygienists, orthodontists, College of Dental Medicine students and residents, and Post-Graduate Orthodontic Clinic staff/employees at its dental clinics, including but not limited to the Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida between 2015 and 2018, at least. Plaintiff specifically alleges:

PARTIES, STATUTORY COMPLIANCE, JURISDICTION AND VENUE

Plaintiffs

1. At all times herein material, Plaintiff, TIFFANY AGUERO, is and was a resident of Davie, in the County of Broward and the State of Florida, whose minor child, L.H., received dental/orthodontic care at NSU's Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida from May 2017 through November 2018.

Defendant

2. At all times herein material, Defendant, NSU, is and was a Florida corporation, licensed and authorized to do business in the State of Florida and in fact engaged in business in and about the State of Florida to include Broward County, Florida. NSU's principal place of business was and is located at 3301 College Ave., Fort Lauderdale, FL 33314. NSU is a school of higher education providing education services and training in multiple fields, including dentistry and orthodontics.

Jurisdiction and Venue

3. The undersigned counsel hereby certifies that a reasonable investigation in this case has given rise to a good faith belief that grounds exist for an action against the above named Defendant, NSU.

4. This is an action for damages in excess of the jurisdictional requirements of this court, exclusive of interest, court costs and attorney's fees, for which Plaintiff seeks a trial by jury for all matters of right.
5. Venue is also proper in the 17th Judicial Circuit in and for Broward County, Florida as the events giving rise to this action took place in Broward County, Florida and the Defendant, NSU, operated its Post-Graduate Orthodontic Clinic and other dental clinics in Broward County, Florida.
6. Plaintiff has retained the services of the undersigned law firm and is obligated to pay reasonable fees for their services.

FACTUAL ALLEGATIONS

7. Between July 2015 and February 2018, all Plaintiffs and Class Members received dental/orthodontic care at NSU's Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida.
8. NSU provided, or should have provided, education and training to its students, and post-graduate students and residents, in sterilization of dental/orthodontic equipment.
9. The dental/orthodontic care received by Plaintiffs and Class Members was rendered by NSU employed or affiliated dentists, hygienists, orthodontists, College of Dental Medicine students and residents, and Post-Graduate Orthodontic Clinic staff/employees.
10. According to NSU's own admissions, post-doctoral residents – dentists who were training in orthodontics—at the Post-Graduate Orthodontic Clinic failed to sterilize equipment prior to its use on Plaintiffs and Class Members.

11. The Centers for Disease Control and Prevention Guidelines for Infection Control in Dental Health-Care Settings (2003) requires complete heat sterilization of dental/orthodontic equipment.
12. Between July 2015 and February 2018, NSU's post-doctoral residents at the Post-Graduate Orthodontic Clinic did not properly sterilize equipment with the required heating process, instead opting to only wipe equipment with a surface disinfectant wipe.
13. As a result of this failure to properly sterilize and lack of supervision and oversight to ensure that proper sterilization techniques were followed, Plaintiffs and Class Members were exposed to multiple viral infections/diseases.
14. Those exposed to viral infections included individuals who underwent certain dental/orthodontic procedures, including placement or removal of braces, and bracket repairs.
15. In November 2018, Plaintiffs and Class Members received a letter from NSU stating:

"At one of our clinics, the Post-Graduate Orthodontic Clinic at 3200 South University Drive in Davie, we discovered there was an inconsistency in the prescribed sterilization protocols. Our records indicate that you were one of the patients who may have been exposed to this deviation in protocol.

This deviation created a minimal risk for possible exposure to certain viruses. According to an independent infection control expert that NSU retained, the risk is extremely low. However, in an abundance of caution, the University believes it is important to share this information with you and, if you would like to have a screening blood test, please contact us."

See Letter sent to Plaintiff and Class Members, attached hereto as Exhibit "A".

16. Plaintiffs and Class Members thereafter scheduled and underwent testing to determine if they had contracted a viral infection/disease, including Hepatitis C, Hepatitis B, or HIV.
17. Plaintiffs and Class Members who underwent testing had to wait, or will have to wait months, to completely rule-out that they have contracted any viral infection/disease.
18. Defendant, by and through its agents, concealed the acts complained of herein from all members of the class until November 2018, when it caused to be issued and generated the aforesaid subject notice letters.
19. In fact, Defendant, by and through its agents, knew of “deviations” in “the prescribed sterilization protocols” as of April 10, 2018 (and most likely earlier), as evidenced by correspondence sent by the Executive Associate Dean of the NSU College of Dental Medicine, Peter A. Keller, DDS, to the entire Class of students at the College of Dental Medicine. See email correspondence attached hereto as Exhibit “B”.
20. All conditions precedent for Plaintiffs’ claims, have been satisfied or performed or have occurred.

CLASS REPRESENTATION ALLEGATIONS

21. Plaintiffs bring this action as a class action against Defendant pursuant to Florida Rule of Civil Procedure 1.220 for damages in excess of \$15,000.00. The “Class” or “Class Members” Plaintiffs seek to certify is/are defined as:

All NSU patients who received a letter from NSU informing them of possible exposure to certain viruses as a result of a deviation in prescribed sterilization protocols while a patient at NSU’s Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida, between July 2015 to February 2018, and who subsequently tested negative for active viral infections.

There is a Sub-class encompassing parents of all minor NSU patients who received a letter from NSU informing them of their child's possible exposure to certain viruses as a result of a deviation in prescribed sterilization protocols while their child was a patient at NSU's Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida, between July 2015 to February 2018, and whose child subsequently tested negative for active viral infections

Excluded from the Class are Defendant, their parents, subsidiaries and affiliates, their directors and officers and members of their immediate families.

Numerosity (Rule 1.220 (a) (1))

22. The members of the Class are so numerous that separate joinder of each Class member is impracticable, particularly because their identities are or should be presently known only to Defendant NSU. The Class, upon information and belief, consists of approximately 1,152 class members¹. The Defendant has, or should have, dental records indicating which patients underwent dental/orthodontic procedures during the time period in question at NSU's Post-Graduate Orthodontic Clinic at 3200 South University Drive in Davie, Florida. The precise number of Class members can only be obtained through discovery.

Commonality (Rule 1.220 (a) (2))

23. The claim of Plaintiffs raises questions of law and/or fact common to the questions of law and/or fact raised by the claim of each member of the Class. Among these common questions are the following:
- a. Whether the Defendant was negligent, vicariously and/or directly, in relation to the creation, implementation, or oversight of protocols for sterilization; supervision of NSU's students and post-graduate students

¹ This number is based upon various reports that NSU sent letters to 1,152 patients who were potentially exposed to infection.

and residents relating to their sterilization of dental/orthodontic equipment; and/or in the sterilization of dental/orthodontic equipment at NSU's Post-Graduate Orthodontic Clinic between July 2015 and February 2018.

- b. What is the reasonable value of the emotional distress caused to Plaintiff and the Class Members for the emotional distress suffered by them in the period of time when the Defendant sent them the November 2018 letter and the Plaintiff and the Class Members received their respective negative test results.
- c. What is the reasonable value of the emotional distress caused to Plaintiff and the Class Members for the emotional distress suffered by them in the period of time when the Defendant sent them the November 2018 letter and the Plaintiff and the Class Members received their respective negative test results.

Typicality (Rule 1.220 (a) (3))

- 24. The claim of the Plaintiff is typical of the claim of each member of the Class. Each Plaintiff and each member of the Class received a letter from NSU informing them of possible exposure to certain viruses as a result of a deviation in prescribed sterilization protocols while a patient at NSU's Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida, between July 2015 to February 2018, and who subsequently tested negative for active viral infections.

Adequacy of Representation (Rule 1.220 (a) (4))

- 25. Plaintiff can and will fairly and adequately protect and represent the interests of each member of the Class. Plaintiff has an interest in common with the class and

is committed to the vigorous prosecution of this action. There is no hostility between Plaintiff and the unnamed Class members. Plaintiff retained competent counsel, experienced in litigation of this nature, to represent her. To prosecute this case, Plaintiff has engaged Cohen, Blostein & Ayala, P.A., a law firm with ample experience in medical malpractice and class action litigation and the legal resources available to effectively represent the Plaintiff in a class action law suit of this type.

Applicability of Rule 1.220 (b) (3)

26. The provision of subdivision (b) of Rule 1.220 under which it is claimed that the claim is maintainable on behalf of a class is (b)(3); the questions of law or fact common to the claim of Plaintiff and of each member of the Class predominate over any questions of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy:
- a. There are no known individual Class members who are interested in individually controlling the prosecution of separate actions.
 - b. There exists no known pending litigation to which any member of the class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated. There has never been a prior lawsuit certified as a class on behalf of Plaintiff or the Class.
 - c. It is desirable to concentrate the litigation in this forum; the interests of justice will be well served by resolving the common disputes of potential Class members in this forum.
 - d. The action is manageable as a class action; no difficulties are likely to be encountered in the management of the claim.

- e. Individual suits would not be cost effective, especially in light of the fact that there are 1,152 Class Members. It is highly unlikely that individual plaintiffs would shoulder the burden of this litigation as many do not have the resources to bring separate actions, particularly for the nature of the damages alleged.
- f. All claims by the named Plaintiff and unnamed Class Members are based on the same alleged negligence by Defendant in relation to the failure to properly sterilize, or supervise the sterilization, of dental/orthodontic equipment at NSU's Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida between July 2015 to February 2018, and who received a letter from NSU informing them of possible exposure to certain viruses as a result of a deviation in prescribed sterilization protocols. Common issues predominate when, as here, liability can be determined on a class-wide basis, even when there are some individualized damages. As a result, when determining whether common questions predominate, courts focus on the liability issue and if the liability issue is common to the class, as in the case at bar, common questions are held to predominate over individual questions.

COUNT I
Common Law Negligence
On Behalf of the Entire Class

- 27. Plaintiffs reallege and incorporate by reference paragraphs 1 - 26 of this complaint.
- 28. Defendant, NSU, by and through its agents, servants and employees, owed Plaintiff and Class Members a duty to use the degree of care, skill, diligence and

attention exercised by dental/orthodontic clinics and offices generally to appropriately supervise and ensure compliance with sterilization protocols by students, post-graduate students and residents, hygienists, and dentists/orthodontists at its Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida.

29. Defendant, NSU, by and through its students, post-graduate students and residents, hygienists, dentists/orthodontists, agents, servants and employees, owed Plaintiff and Class Members a duty to use the degree of care, skill, diligence and attention exercised by dental/orthodontic clinics and offices generally to properly and completely sterilize all dental/orthodontic equipment requiring such sterilization as required by CDC Guidelines.
30. Defendant, NSU, its agents, servants, and employees, breached their duty to Plaintiff and Class Members by failing to supervise and ensure compliance with sterilization protocols by students, post-graduate students and residents, hygienists, and dentists/orthodontists at its Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida.
31. Defendant, NSU, its agents, servants, and employees, breached their duty to Plaintiff and Class Members by failing to create and implement appropriate sterilization protocols to be followed by all NSU students, post-graduate students and residents, hygienists, and dentists/orthodontists who provided dental/orthodontic care at its Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida.

32. Defendant, NSU, its agents, servants, and employees, breached their duty to Plaintiff and Class Members by failing to properly and completely sterilize all dental/orthodontic equipment requiring such sterilization as required by CDC Guidelines.
33. As a direct and proximate result, Plaintiff and Class Members suffered emotional distress in the period of time when the Defendant sent them the November 2018 letter and the Plaintiff and the Class Members received their respective negative test results.
34. WHEREFORE, Plaintiff alleges the existence of a class action under Florida Rule of Civil Procedure 1.220, and demands judgment against Defendant, NSU, for damages for the emotional distress suffered, attorneys' fees as permitted, costs as permitted, interest as permitted, and such other relief as the Court deems just and appropriate.

COUNT II
Vicarious Liability
On Behalf of the Entire Class

35. Plaintiffs reallege and incorporate by reference paragraphs 1 - 26 of this Complaint.
36. Defendant, NSU, is vicariously liable for any negligent actions or omissions committed by NSU students, post-graduate students and residents, hygienists, and dentists/orthodontists during the course of their actual or apparent agency, educational responsibilities, or employment with Defendant NSU in their sterilization of dental/orthodontic equipment used on Plaintiff and Class Members.

37. NSU students, post-graduate students and residents, hygienists, and dentists/orthodontists thereafter negligently exposed Plaintiffs and the “Class” or “Class Members” to HIV, Hepatitis C, Hepatitis B, and other viruses by failing to use the requisite degree of care, skill, diligence and/or attention in sterilizing dental/orthodontic equipment at NSU’s Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida between 2015 and 2018.
38. As a direct and proximate result, Plaintiff and Class Members suffered emotional distress in the period of time when the Defendant sent them the November 2018 letter and the Plaintiff and the Class Members received their respective negative test results.
39. WHEREFORE, Plaintiff alleges the existence of a class action under Florida Rule of Civil Procedure 1.220, and demands judgment against Defendant, NSU, for damages for the emotional distress suffered, attorneys’ fees as permitted, costs as permitted, interest as permitted, and such other relief as the Court deems just and appropriate.

COUNT III
Negligent Infliction of Emotional Distress
On Behalf of the Entire Class

40. Plaintiff realleges and incorporates by reference paragraphs 1 - 26 of this Complaint.
41. Defendant, NSU, by and through its agents, servants and employees, owed Plaintiff and Class Members a duty to use the degree of care, skill, diligence and attention exercised by dental/orthodontic clinics and offices generally to appropriately supervise and ensure compliance with sterilization protocols by

students, post-graduate students and residents, hygienists, and dentists/orthodontists at its Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida.

42. Defendant, NSU, by and through its students, post-graduate students and residents, hygienists, dentists/orthodontists, agents, servants and employees, owed Plaintiff and Class Members a duty to use the degree of care, skill, diligence and attention exercised by dental/orthodontic clinics and offices generally to properly and completely sterilize all dental/orthodontic equipment requiring such sterilization as required by CDC Guidelines.
43. Defendant, NSU, its agents, servants, and employees, breached their duty to Plaintiff and Class Members by failing to supervise and ensure compliance with sterilization protocols by students, post-graduate students and residents, hygienists, and dentists/orthodontists at its Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida.
44. Defendant, NSU, its agents, servants, and employees, breached their duty to Plaintiff and Class Members by failing to create and implement appropriate sterilization protocols to be followed by all NSU students, post-graduate students and residents, hygienists, and dentists/orthodontists who provided dental/orthodontic care at its Post-Graduate Orthodontic Clinic located at 3200 South University Drive in Davie, Florida.
45. Defendant, NSU, its agents, servants, and employees, breached their duty to Plaintiff and Class Members by failing to properly and completely sterilize all

dental/orthodontic equipment requiring such sterilization as required by CDC Guidelines.

46. Plaintiff, TIFFANY AGUERO, is the mother of L.H., a minor, and received the November 2018 letter from NSU advising that her daughter may have been exposed to multiple viral infections/diseases.
47. Plaintiff, TIFFANY AGUERO, is a member of the Sub-Class, and like other members of the Sub-Class, immediately suffered emotional distress upon learning through NSU's November 2018 letter that their child/children may have been exposed to multiple viral infections/diseases.
48. As a direct and proximate result of the above actions/deviations by Defendant, NSU, and reading the November 2018 letter sent by NSU, Plaintiff and the Sub-Class members have suffered damages including but not limited to:
 - a. Migraine headaches
 - b. Breathing difficulties
 - c. Acid reflux
 - d. Post-traumatic stress disorder
 - e. High blood pressure
 - f. Severe weight loss
 - g. Gastrointestinal problems
 - h. Accelerated aging
49. WHEREFORE, Plaintiff alleges the existence of a class action under Florida Rule of Civil Procedure 1.220, and demand judgment against Defendant, NSU, for damages for the emotional distress suffered, attorneys' fees as permitted, costs as permitted, interest as permitted, and such other relief as the Court deems just and appropriate.

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on any and all counts for which a trial by jury is permitted.

DATED this 10th day of December, 2018.

Respectfully submitted,

COHEN, BLOSTEIN & AYALA, P.A.

Jay Cohen, Esq.

Rudwin Ayala, Esq.

100 SE 3RD Ave., Suite 1100

Fort Lauderdale, FL 33394

Telephone No.: (954) 449-8700

Facsimile No.: (954) 763-6093

By: /s/ Jay Cohen

JAY COHEN, Esq.

Florida Bar No. 292192

Friday, Nov. 23, 2018

Dear [REDACTED]:

Nova Southeastern University's College of Dental Medicine is committed to providing high-quality orthodontic care. NSU understands the importance of the services we provide to the patients of South Florida, and we take this commitment very seriously. The College of Dental Medicine operates 12 dental clinics offering a range of dental services across Broward County. Your safety and well-being are our highest priority.

At only one of our clinics, the Post-Graduate Orthodontic Clinic at 3200 South University Drive in Davie, we discovered there was an inconsistency in the prescribed sterilization protocols. Our records indicate that you were one of the patients who may have been exposed to this deviation in protocol.

This deviation created a minimal risk for possible exposure to certain viruses. According to an independent infection control expert that NSU retained, the risk is extremely low. However, in an abundance of caution, the University believes it is important to share this information with you and, if you would like to have a screening blood test, please contact us.

We have arranged for you to speak with a member of a team of NSU physicians. This team will schedule your visit, provide the proper lab requisition form and refer you to an independent testing laboratory. However, should you wish to consult with your own physician, please have your doctor contact the NSU medical team at the number below so the appropriate laboratory forms are issued. NSU will cover the cost of these physician visits and lab tests recommended by the Center for Disease Control and Prevention (CDC).

The NSU medical team is on call Monday through Friday between 9 a.m. and 5 p.m. at (954) 262-4144 for the next 60 days.

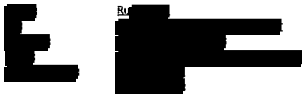
We regret this occurrence and the necessity of having to share this information with you, but we are here to assist you now and in the future.

Sincerely,

Linda Nlessen, DMD

Linda Nlessen, D.M.D., M.P.H., M.P.P.
Dean and Professor





[REDACTED]@LIST.ACAST.NOVA.EDU> on behalf of Peter Keller <pkeller@NOVA.EDU>

Reply all | v

Tue 4/10 3 PM

Dear Class [REDACTED],

It has come to Dr. Kodish's and my attention that students are having difficulty sterilizing their handpieces when they run late during the morning clinic session. This can result in a delay in obtaining their sterilized handpieces in time to provide patient care in the afternoon clinic. We have also learned that there have been problems with students getting their handpieces sterilized in time to care for a patient in the morning, after they have been practicing in the Sim lab the night before.

These problems will be resolved by students having a second handpiece. When one handpiece is being sterilized, the second handpiece will be available for use.

[REDACTED] students --- All soon to be [REDACTED] students at the College of Dental Medicine will be required to purchase in their [REDACTED] kit a specific bur block for the Esthetics Course and a second specific electric handpiece from the Schein store by May 25, 2018. The bur block will cost about \$100.00 and the handpiece about \$650.00.

[REDACTED] students --- All soon to be [REDACTED] students at the College of Dental Medicine will be required to purchase a second specific electric handpiece from the Schein store by May 25, 2018. The handpiece will cost about \$650.00.

Presently, the Department of Student Services is taking the necessary steps to accommodate your Financial Aid package. Thank you for your cooperation.

Peter A. Keller, DDS

Executive Associate Dean
College of Dental Medicine
Nova Southeastern University

